**Portland Airport Limousine Co., Inc., d/b/a PALCO *and* Teamsters Union Local 340, a/w International Brotherhood of Teamsters, AFL–CIO.** Case 1–CA–32659

January 21, 1998

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On October 13, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act when it discharged employee Wayne Speed on February 22, 1995, because he refused to drive a truck which he believed to be unsafe. The General Counsel has excepted to the judge's dismissal of the complaint. We reverse the judge and find that the Respondent's discharge of Speed was unlawful.

Wayne Speed was employed by the Respondent as a truckdriver at its Scarborough, Maine facility. This case involves events occurring on February 21 and 22, 1995.[2] The facts, which are set forth in detail in the judge's decision, can be summarized as follows. Speed testified that on February 21, he noticed an exhaust smell in the tractor which he regularly drove. He inspected the tractor, but could not locate the source of the fumes. Speed filed a vehicle inspection report with the Respondent, which stated that the tractor had an ''exhaust leak.'' In response to Speed's report, the Respondent obtained an inspection of the truck by R & R Services, a company that maintains and repairs the Respondent's equipment. R & R Services found no exhaust leaks on Speed's tractor, and reported that the truck was safe to operate.

On the next day, February 22, Speed reported to work and drove his tractor with a trailer to a location within Maine. After arriving at his destination, Speed called John Connolly, the Respondent's dispatcher, and told him that he had completed his run but that he still smelled exhaust fumes and that it would not be safe to drive the truck outside of Maine. Speed returned to the Respondent's facility that morning, left the trailer in the yard, reported to the dispatcher's office, and asked Connolly what he should do about his tractor. Connolly told him to take the tractor to Triple J, another vehicle maintenance company used by the Respondent. Speed took the truck to Triple J, which examined the vehicle, but could not locate an exhaust leak that would cause fumes to enter into the cab. Speed returned to the Respondent's facility, and told Connolly that Triple J had found nothing unsafe on the tractor.

The Respondent's operations manager, Stephen Bennett, testified that he wanted Speed to make a run to Boston that day, but that Bennett knew that Speed did not want to drive the tractor in question. Thus, Bennett decided to have Speed exchange tractors with fellow driver Emile Pelchat, and have Speed take Pelchat's truck to Boston. In turn, Pelchat, who was a new employee not familiar with the Boston run, was to drive Speed's truck for local jobs. Bennett told Speed to go out into the yard and to notify Pelchat of the switch.

Speed approached Pelchat in the yard and told him that they were going to switch tractors, and that he was going to take Pelchat's tractor to Boston. Pelchat asked why and Speed replied that his truck was not safe and that he smelled fumes, but that he had to take a run to Boston. Pelchat responded that he was not going to drive an unsafe truck either, and he went inside to the office. Pelchat told Bennett that if the truck was unsafe for Speed, it was not safe for anyone. Pelchat stated that he was not going to drive the truck, and that he would quit before doing so. Bennett, however, directed Pelchat to exchange trucks with Speed. The Respondent's owner, Mark Bernstein, joined the conversation with Pelchat and told him that the truck had been inspected and that the mechanics could not find anything wrong with it. Bernstein told Pelchat to drive the tractor around the block and check it out for himself. Pelchat did so and could not smell any fumes. Nevertheless, Pelchat remained nervous about the situation and, when he had difficulty attaching a trailer to the tractor, Bennett told him to take off the rest of the day.

Bernstein told Bennett that Pelchat ''shouldn't be involved in the situation'' and that Speed ''should be dealt with.'' Bernstein added that the drivers should not be allowed to pick and choose the jobs they were going to take, and that if an employee did not want to take a load, he should be fired. Bernstein then asked Speed several times whether he was going to take the load and Speed replied that he would not drive an unsafe truck. Bernstein told Speed that the truck had

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates refer to 1995, unless stated otherwise.

been checked and found to be safe by three different mechanics. Bernstein said to Speed: ''Wayne, we have a job that we expect you to do and I'm asking you to take your truck and do your job. Will you do it?'' Speed said that he would not, and Bernstein told him that if Speed would not do his job, then he was fired, and that he could not pick and choose which jobs to do. When Speed continued to refuse to drive his truck, Bernstein told him that he was fired.

Applying the Board's decision in *Meyers Industries*,[3] the judge found that Speed was not engaged in any concerted activity which fell within the coverage of Section 7 of the Act. Instead, the judge found that Speed's statement to Pelchat was an individual action, the sole purpose of which was to benefit Speed. The judge concluded that by telling Pelchat that he was exchanging trucks with him, Speed ''was not seeking to initiate, induce or prepare for group action.'' Consequently, the judge found that the General Counsel had failed to establish that Speed was engaged in concerted activities. The judge therefore found it unnecessary to decide whether Speed's conduct was ''protected'' under the Act. We disagree with the judge's findings.

The issues presented by this case are whether Speed was engaged in protected concerted activity and, if so, whether the Respondent discharged Speed because of that activity. With respect to the key issue of whether Speed's conduct was concerted in nature, we note that the conversation between Speed and Pelchat led to Pelchat's initial refusal to drive the truck. Thus, this case involves two employees refusing to drive a truck because of a shared concern about the truck's safety. Once Speed and Pelchat had their conversation and Pelchat protested to management about the reassignment of the trucks, Speed no longer was acting in furtherance of an individual complaint. Instead, the Respondent was faced with a concerted refusal by both of these employees to drive Speed's tractor. The Respondent knew about that concerted refusal, and the conclusion is inescapable that the Respondent discharged Speed as a result.

In the situation presented here, the reason for Speed's discharge—i.e., his refusal to drive the truck—cannot be separated from the concerted nature of the two employees' refusals to drive the truck. Accordingly, we find that the motivating factors in Speed's discharge were his conversation with Pelchat—clearly concerted activity—and Pelchat's response to that conversation, i.e., Pelchat's protests to Bennett and Bernstein about being assigned to drive a truck that Pelchat believed to be unsafe.

In addition, we find that Speed's refusal to drive the truck and Speed's conversation with Pelchat about the safety of the truck and the reassignment of the truck to Pelchat constituted protected activity. The subject matter of Speed's complaint and his conversation with Pelchat clearly involved terms and conditions of employment. There is no evidence that Speed's complaint about his truck was made in bad faith, and the reasonableness of Speed's belief about the safety of his truck is irrelevant to the determination of whether his conduct was protected under the Act.[4]

The Respondent contends that, even assuming that Speed's refusal to drive the truck was concerted, Speed was discharged for the lawful, legitimate reason that he refused to follow management's order to complete an assigned task and drive the scheduled load to Boston. Contrary to the Respondent's asserted reason for the discharge, Speed did not refuse to perform an assigned task. In the circumstances here, we find that Speed was not attempting to ''pick and choose'' what jobs he would perform, nor was he engaging in a partial strike. Rather, events occurred in this case which belie the Respondent's argument that Speed refused to complete the assignment. Specifically, after Pelchat was sent home, his truck was available for Speed to drive that day to Boston. This, in fact, was precisely the situation that the Respondent sought when it told Speed to exchange tractors with Pelchat; i.e., that Speed would drive Pelchat's truck to Boston. The Respondent, however, did not give Speed the opportunity to drive Pelchat's truck to Boston once it was available, but instead the Respondent focused on Speed's conversation with Pelchat, and would not permit Speed to take Pelchat's truck because Speed had raised his safety concerns with Pelchat. The record shows that, once Pelchat was sent home, there no longer was any valid reason for the Respondent to insist that Speed drive his own truck to Boston. In fact, Speed was ready and willing to make the necessary run to Boston in Pelchat's truck. This was a course of action which Bennett himself had devised in order to accommodate Speed's reluctance to drive his regular tractor. It was not until Pelchat complained to Bennett and Bernstein about this accommodation, that the Respondent insisted that Speed drive his own truck to Boston. When Speed refused to do so, the Respondent discharged him. Thus, it is clear that the reason for Speed's discharge was his acting in concert with Pelchat regarding their mutual safety concerns about the tractor. But for Pelchat's concerted protest about the truck, Speed would have been permitted to drive Pelchat's truck to Boston, and to complete the Boston assignment. On these facts, we draw the reasonable inference that Bernstein would not have discharged Speed absent his conversation with Pelchat and Pelchat's subsequent refusal to drive Speed's truck. Thus, before Speed involved Pelchat in his safety concerns, the Respondent

[3] 281 NLRB 882 (1986).

[4] See *Wagner-Smith Co.*, 262 NLRB 999 fn. 2 (1982), and the cases cited therein.

was willing to assign Pelchat's truck to Speed, and without Pelchat's involvement, Speed would have made the run to Boston. Once Speed brought Pelchat into the dispute over the safety of the truck, the Respondent's position changed, and it no longer would permit Speed to drive Pelchat's truck, even though Pelchat was not going to drive it that day. Therefore, we are led to the conclusion that Speed's concerted activity with Pelchat is what led to his discharge. Accordingly, we find that the Respondent has failed to carry its burden to demonstrate that it would have discharged Speed notwithstanding Speed's protected concerted activity.[5] In these circumstances, we find that the Respondent violated Section 8(a)(1) by discharging Speed, and we shall order the Respondent to offer him resintatement and to make him whole for any monetary loss that he has suffered as a result of his discharge.[6]

## CONCLUSIONS OF LAW

1. The Respondent, Portland Airport Limousine Co., Inc., d/b/a Palco, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employee Wayne Speed because of his protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has unlawfully discharged employee Wayne Speed, we shall order the Respondent to offer him full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits he may have suffered from the time of his discharge to the date of the Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Portland Airport Limousine Co., Inc., d/b/a Palco, Scarborough, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wayne Speed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wayne Speed whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Wayne Speed, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Scarborough, Maine facility copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Re-

[5] This situation is distinguishable from that present in *Yellow Freight System, Inc.*, 247 NLRB 177, 179 (1980), where the issue was whether the respondent employer had discharged an employee (Novak) for engaging in a protected concerted activity when it terminated him after he refused to perform a work assignment that the General Counsel alleged was in conflict with the applicable collective-bargaining agreement. The Board in *Yellow Freight* adopted without comment the administrative law judge's finding that the discharge was lawful because Novak's refusal to perform the work did not involve the assertion of a reasonably based contract right, and that even if Novak could be deemed to have asserted such a right, his action was unprotected because it was insubordination to refuse the assignment instead of using the grievance machinery to protest it. 247 NLRB at 181. Here, as explained above, Speed was willing to perform the assignment and could have done so using Pelchat's truck, which was available after Pelchat was released for the day.

[6] As he stated in *Liberty Natural Products*, 314 NLRB 630 fn. 4 (1994), Chairman Gould questions the validity of the ultimate holding in *Meyers I & II*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). He notes, however, that the conduct here would be found concerted even under the standard of those cases. 268 NLRB at 497; 281 NLRB at 882.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

spondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Wayne Speed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wayne Speed whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Wayne Speed and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

PORTLAND AIRPORT LIMOUSINE CO., INC., D/B/A PALCO

*John Downs, Esq.*, for the General Counsel.
*Lawrence C. Winger, Esq. (Verrill & Dana)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on August 16, 1995,[1] in Westbrook, Maine. The complaint, which issued on May 25 and was based on an unfair labor practice charge and an amended charge that were filed on February 27 and May 22 by Teamsters Union Local 340, a/w International Brotherhood of Teamsters, AFL–CIO (the Union), alleges that Portland Airport Limousine Co., Inc., d/b/a PALCO (the Respondent) violated Section 8(a)(1) of the Act when it discharged employee Wayne Speed on February 22 because he complained to the Respondent about the wages, hours, and working conditions of its employees and because he refused to operate an unsafe truck assigned to him by Respondent, and informed another employee of the unsafe condition of the vehicle. Respondent admits that it discharged Speed on February 22, but defends that there was no protected concerted activities involved herein. It defends that it inspected Speed's vehicle on about three occasions and found nothing unsafe about its condition, and that Speed was not protesting an unsafe condition; rather, he simply did not want to perform his assignment for that day.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. FACTS

Although Respondent's name suggests that it operates a passenger limousine service from the Portland, Maine airport, the operation and employees involved herein relate to a trucking company operated by the Respondent. Mark Bernstein is the owner of Respondent, while Stephen Bennett was the operations manager, and John Connolly was the morning dispatcher at the time. Speed was a truck driver employed by Respondent beginning in about mid-1994; he was terminated by Respondent on February 22 for refusing to do his run, allegedly because he smelled fumes in the tractor's cab.

#### A. *The Condition of the Truck*

Speed's regular vehicle was tractor No. 40. He testified that on February 21 he noticed an exhaust smell in his tractor. At that time, he inspected his tractor, but could not locate the source of the fumes; however, he filed with Respondent a driver vehicle inspection report stating solely: ''Exhaust Leak.'' After receipt of this form, Respondent arranged for R & R Services (R & R), which performs maintenance and repair work on Respondent's equipment, to inspect the truck at Respondent's facility that same day, but they

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1995.

could not locate any exhaust leakage. Bennett testified that on the afternoon of February 21, Speed complained to him about headaches that he felt were the result of exhaust fumes from his tractor and he called R & R and had them come to the facility to check the tractor later that day. Lance Reny, the owner of R & R, testified that on February 21 he received a call from Connolly saying that a driver was complaining about exhaust fumes in the cab of his tractor and he asked Reny to come to the facility to check on it. Later that afternoon, he inspected the tractor, found no leaks in or around the engine compartment or the cab area, and reported that the truck was safe to operate.

Speed reported for work on the following morning, hooked up his tractor to a trailer, and drove to Jay, Maine. After arriving in Jay, he called Connolly and said that he had completed his run, but that he still smelled the exhaust fumes,[2] and that it would not be safe to drive the truck outside the State of Maine, although he never explained to Connolly or the court why he differentiated between driving in and outside of the State of Maine. He returned to Respondent's facility at about 10:30 to 11 that morning, left the trailer in the yard, and reported to the dispatcher's office and asked Connolly what he should do about his tractor. Connolly told him to take the tractor to Triple J, another vehicle maintenance operation employed by Respondent. Speed testified that he took the tractor to Triple J where they examined the vehicle, but could not locate an exhaust leak. After blocking the exhaust and putting it under pressure, they did locate a ''pinhole'' sized leak in the exhaust on the outside of the trailer. He returned the tractor to Respondent's facility and reported the results to Connolly who looked at the inspection sticker on the tractor and told him that since the tractor was due for its regular inspection, he should bring it back to Triple J for that purpose, and he did so. The Triple J mechanic inspected the tractor and said that the ''bushings were gone'' and that the U joint on the steering shaft needed to be replaced and Speed returned to Respondent's facility and gave this report to Connolly. Connolly could recollect very little of the events of that day. He testified, however, that when Speed returned from his run on the morning of February 22, he complained that he smelled fumes in his truck. After conferring with Bennett, Connolly told Speed to take his tractor to Triple J to see if they can find the source of the fumes. Bennett handled the incident subsequent to that time. Bennett testified that he authorized Speed to take his tractor to Triple J for an inspection and they could not locate any exhaust leak. However, it was near the end of the month when the tractor's inspection sticker was to expire, and Bennett told Triple J to do its yearly inspection on the tractor and give it a new sticker. During this inspection, they found some other work that would have had to be done to the tractor in order for it to be given a sticker, and this work was performed, and the tractor received its new sticker.

Josselin Beaulieu, the owner of Triple J, testified that on the morning of February 22, Speed and Connolly brought Speed's tractor into his facility; Speed complained that it had an exhaust leak. He checked it out, but could not locate any leak that would cause exhaust fumes to enter the cab and Speed and Connolly left with the tractor. Shortly thereafter, Speed returned with the tractor and they checked it again. They covered the exhaust pipe to pressurize it, but again found no leaks. Beaulieu testified that the tractor was back in his shop that Saturday because it was due for an inspection, and a new muffler and tail pipe were installed. However, a Triple J invoice dated February 22, for tractor No. 40, states: ''Commercial inspection. RR Muffler Assy. Replace lower steering U-Joint. Replace rear equalizer bushings.'' He testified that at no time was this tractor unsafe to operate. The reason that he performed the work specified in the February 22 invoice is that for inspection purposes, ''we have to consider a whole year ahead from today's date, to next year's date'' When he inspected Speed's vehicle: ''there's nothing on this truck that needed to be shut down'' Reny testified that tractor No. 40 returned to his shop on February 22. Connolly brought it over on that day (no time is specified) and they examined it together, and ''the only thing we did find was a small pin hole at the top of the exhaust stack, outside and above the cab, which would not put exhaust fumes into the cab.''

B. *Exchange of Trucks*

Bennett testified:

> Well, I wanted Wayne to go to Boston in that truck. He didn't really want to drive it. And, in order to get some work done, I was going to switch tractors, let him drive a different tractor and just keep that one local just so I could get the work done, and that was the plan at that time.''

Bennett testified that, in furtherance of this plan, he told Speed to exchange tractors with Emile Pelchat, a new employee, and take Pelchat's truck to Boston. He would then have Pelchat, who was not familiar with the Boston run, drive Speed's truck locally. He sent Speed out to notify Pelchat and make the exchange. Speed testified that shortly after returning from Triple J, either Connolly or Bennett told him to take Pelchat's tractor, hook it up to a trailer, and do the Boston run. Speed saw Pelchat driving into the yard and told him that they were going to exchange tractors, and that he was going to take Pelchat's tractor to Boston. Pelchat asked why and he said that his truck was not safe and he had to take a run to Boston and was going to use Pelchat's truck. Pelchat asked what was going to happen to him, and Speed said that he didn't know. He testified that Pelchat got upset and said that he was not going to drive tractor No. 40 either and went inside to the office. Meanwhile, Speed began to get Pelchat's tractor ready to go by hooking it up with an empty trailer. Pelchat, who began working for Respondent about a month earlier, testified that when he drove into the yard with his truck, Speed told him: ''I'm taking your truck. I'm not driving mine. I smell fumes.'' Speed also said: ''I'm not driving that thing'' with ''a couple of choice words in between.'' Pelchat responded: ''Well, if it's good for the goose, it's good for the gander. If it's not safe for you, it's not safe for me. Or any driver.'' That was the extent of that conversation of the condition of tractor No. 40, and was the only conversation he ever had with Speed about the condition of the truck.

After this conversation with Speed, Pelchat went into the office and told Bennett that if the truck was unsafe, he was

[2] Speed testified that he is a cigarette smoker and was smoking while driving to Jay on that morning.

not going to drive it either, but Bennett told him that he was to take Speed's truck and that Speed would take his truck. Pelchat testified that he was upset about being ordered to drive Speed's truck because he felt that if it was not safe for Speed it was not safe for anyone. Bernstein met with him and told him that they had the truck inspected and the mechanics were unable to locate anything wrong with it. He told Pelchat to drive the truck around the block and check it out for himself. Pelchat did so and could not smell any fumes: ''I didn't notice any difference in his truck or my truck.'' Bennett then told him to attach an empty trailer to the tractor to be sure that he was satisfied that it was not unsafe. Pelchat testified that he was so nervous because of the preceding events that it took him seven tries before he finally connected the trailer to the tractor. By this time, he was so nervous that Bennett told him to take off the rest of the day.

Bennett testified that shortly after he told Speed to exchange tractors with Pelchat, Pelchat came into the office and told him that he was not going to drive another employee's unsafe truck, and that he would quit before doing so. Bennett asked him if he knew of anything specifically wrong with the truck and Pelchat said that he didn't, and Bennett asked him to drive it around the block to test it out, but he even refused to do that. Shortly thereafter, ''after he calmed down a bit,'' he again asked Pelchat to drive Speed's truck around the block to see if he smelled fumes or could find anything wrong with the truck, and he did so. Bernstein testified that, at about that time, Bennett made him aware of the situation with truck No. 40; that, beginning the prior day, Speed had claimed that it was not safe to operate because of an alleged exhaust leak. That the truck had been examined by R & R and Triple J and they could not locate any problem, and that although there was no justification for Speed's refusal, in order to get the Boston run out, Bennett had told Speed to exchange trucks with Pelchat, but then Pelchat objected to driving an unsafe vehicle. Bernstein told Bennett:

> I didn't think that was right, that . . . Emile shouldn't be involved in the situation, that . . . Wayne Speed should be dealt with. If he doesn't want to drive a [truck] that's safe, then we'll deal with Wayne Speed. And at that time Steve didn't feel comfortable directing that attention to Wayne Speed and I did. So I confronted Wayne Speed.

He testified that he told Bennett that the drivers should not be allowed to pick and choose the jobs that they were going to take, and he felt that Speed was doing that because his truck had been found to be safe. If an employee did not want to do his job and take a load, he should be dismissed.

### C. *The Termination of Speed*

Speed testified that as he was filling out his log preparing to leave for Boston in Pelchat's truck, John Bell, a dispatcher, approached him and said, ''You can call it a day today.'' Speed asked why, and Bell said, ''We are going to send Emile down to Boston,'' and Speed said, ''fine.'' At that time, Bernstein came out and told him that he was fired. He testified that prior to Bernstein telling him this, Bernstein did not ask him if he would do his run with his truck. Bernstein called him a troublemaker for telling Pelchat that his truck was unsafe to operate. Speed asked, what should he have done, lied to Pelchat? There was a lot of yelling between Speed and Bernstein and Speed threatened to report Bernstein to the Department of Transportation (DOT) Bernstein told him that if he didn't leave his property, he would call the police, and he left. Pelchat testified that he heard Bernstein ask Speed two or three times whether he was going to take the load and Speed replied that he wouldn't, ''with a couple of choice words behind it'' and Bernstein told him, ''You're all done.'' Bernstein testified that when he saw Speed outside the facility, he said, ''What's going on? You're refusing to drive your truck.'' Speed said, ''I'm not driving that truck, it's unsafe.'' Bernstein told him that the truck had been checked and found safe by three different mechanics: ''Wayne, we have a job that we expect you to do and I'm asking you to take your truck and do your job. Will you do it?'' Speed said that he would not and Bernstein said: ''If you won't do your job, you're fired. You can't pick and choose what jobs you are going to do. Nobody else does, and you aren't.'' Speed told him that he was going to sue him, take him to the DOT and cause him a lot of trouble, and that all the trucks he drove for Respondent were junk. Bernstein testified that he asked him three other times whether he would take his truck to Boston and he said that he wouldn't. Speed then began using profanity and Bernstein told him that he was fired. Speed then began making more threats, and Bernstein told him that if he didn't leave, he would call the police, and he left.

## IV. ANALYSIS

The sole issue herein is whether Speed was terminated on February 22 because of his protected concerted activities of protesting the alleged unsafe condition of his tractor, in violation of Section 8(a)(1) of the Act. As ''protected'' is not really an issue herein, the initial question is whether Speed's actions on that day were concerted. If so, the remaining question is whether that was why he was fired. Although credibility does not appear to be critical in this determination, I should note that I found Speed the least credible of the witnesses herein; he was reluctant to make admissions while being questioned on cross-examination, and his testimony of his termination by Bernstein is less believable than that of Pelchat and Bernstein. Therefor, when there are credibility determinations to be made, his testimony will not be credited.

*Meyers Industries*, 281 NLRB 882 (1986), also known as *Meyers II*, is practically a treatise on the subject of what constitutes concerted activities under the Act. The Decision discusses and affirms the findings and reasoning contained in *Meyers I* at 268 NLRB 493. The Board, in *Meyers II*, noted that both the Board in *Meyers I* and the Supreme Court in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), separated the concept of ''concerted activities'' from ''mutual aid and protection.'' The Board also found that the Supreme Court decided that in considering what constitutes concerted activities, the inquiry must determine ''the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees.'' The ultimate issue in these cases is whether the employee was acting solely on his own behalf or was he acting with, or on the authority of other employees. There need only be one other employee to qualify the action as concerted, and the ''group ac-

tivity'' need not be specifically authorized in a formal sense. The Board at 887, stated that concerted activities are present ''where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.'' The Board also quoted with approval the following language from *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3d Cir. 1964):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

In *Alchris Corp.*, 301 NLRB 182 fn. 4 (1991), the Board stated: ''We will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group.'' In *Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285 (8th Cir 1988), a driver requested that his employer install air conditioning in the trucks, but the employer refused. The driver then proposed to the other drivers that he would install such a unit and, if it worked, they could do the same, and they authorized him to present the idea to management. He did so, his idea was rejected and he was fired. In finding a violation, the Court stated:

> Rickman's effort to have an air conditioner installed in his truck were undertaken, not only for his benefit, but also for the benefit of his fellow employees. He discussed his proposal with other drivers, they supported it, and he acted as their representative. Moreover, Woodline knew that Rickman was acting with the support of the other drivers. Thus, the efforts to install air conditioners were clearly concerted.

In the instant matter, the only alleged concerted action is Speed's comments to Pelchat about exchanging trucks. Pelchat's credited testimony is that Speed told him: ''I'm taking your truck. I'm not driving mine. I smell fumes.'' There is no other evidence of concerted actions herein and, apparently, no collective-bargaining agreement under whose terms concerted action may be inferred.[3] I find that Speed's statement to Pelchat was an individual action whose sole purpose was to benefit himself. After all, if the truck were really unsafe as alleged by Speed, exchanging with Pelchat would have a detrimental effect upon him. By telling Pelchat that he was exchanging trucks with him, Speed was not seeking to initiate, induce, or prepare for group action. Rather, he was simply following Bennett's direction and notifying Pelchat that they were to exchange tractors. As was true in *Meyers II*, there is absolutely no evidence that Speed ''joined forces with any other employee or by his activities intended to enlist the support of other employees in a common endeavor.'' *Meyers II*, supra, at fn. 10. I therefor find that counsel for the General Counsel has failed to establish that Speed was engaged in concerted activities herein. Because of this finding, I find it unnecessary to determine whether his activities lost their protection because his tractor had been inspected on three occasions and, on each of those occasions, was found to be safe to operate.[4] I therefore recommend that the complaint be dismissed in its entirety.

## CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

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[3] See *United Parcel Service*, 301 NLRB 1142 (1991); *Dworkin, Inc.*, 301 NLRB 1158 (1991).

[4] I should note that fn. 8 in the General Counsel's brief is somewhat misleading. After the second or third inspection of tractor No. 40, the mechanics did locate a pinhole sized hole in the exhaust on the outside of, and above the cab which posed no danger to the driver. Additionally, it was not the exhaust that had to be repaired in order for the tractor to receive its inspection sticker. Rather it was two other items that posed no immediate safety hazard, but might do so over the following year.